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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Sacramento)**

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THE PEOPLE,

Plaintiff and Respondent,

v.

TAURUS EUGENE GREEN,

Defendant and Appellant.

C043207

(Super. Ct. No. 01F04150)

While conducting surveillance from an undisclosed location, Sacramento County Sheriff's Deputy Larry Cromwell watched defendant Taurus Eugene Green transact what appeared to be a drug sale at the corner of 8th and K Streets in Sacramento. A jury convicted defendant of possession of cocaine base (Health & Saf. Code, § 11350, subd. (a) -- count one) and sale of cocaine base (Health & Saf. Code, § 11352, subd. (a) -- count two). The court found true the allegation that defendant had two prior felony drug convictions. (Health & Saf. Code, § 11370.2, subd.

(a).) It sentenced defendant to an aggregate term of nine years in state prison.

On appeal, defendant argues the court erred in limiting his right to cross-examine Deputy Cromwell about the place from which he observed the drug transaction. Defendant contends he needed to know the exact surveillance location in order to test the truth of Cromwell's testimony. We conclude defendant failed to show there was a reasonable possibility that disclosure would have led to his exoneration. (*People v. Garza* (1995) 32 Cal.App.4th 148, 153-154.) We therefore affirm the judgment.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

The prosecution filed an in limine motion to exclude testimony regarding Deputy Cromwell's exact surveillance location the night of defendant's arrest. The record reveals no written or oral opposition by defense counsel.

The trial court conducted an Evidence Code section 402 hearing "for the purpose of revealing the [exact location] of the officers." Deputy Cromwell invoked the privilege under Evidence Code section 1040, and declined to reveal the information.<sup>1</sup> He stated on the record that surveillance from

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<sup>1</sup> Evidence Code section 1040 reads in part:

"(a) As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

**(CONTINUED)**

that location had led to between 100 and 200 arrests, and it was still in use at the time of the hearing. At that juncture, the trial court held an in camera hearing "to determine whether the disclosure of the exact location [was] required." It explained that "as far as disclosure, . . . if there's some kind of evidence resulting from what they tell me about the location that would result in the exoneration of [defendant], then obviously something like that would have to be disclosed." Defense counsel asked that the sealed record include the deputy's exact location for purposes of any future appeal. After questioning Deputy Cromwell, the court ruled that the deputies were not required to disclose the exact surveillance location.

Thereafter, trial testimony revealed the following evidence:

Deputy Cromwell was working in the vicinity of 8th and K Streets on May 25, 2001, as part of a Regional Transit narcotics task force that patrolled the K Street Mall. He was in radio

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"(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and: [¶] . . . [¶]

"(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice . . . ."

and cell phone communication with his partner, Deputy Brandon Luke, who was close by.

At approximately 10:00 p.m., Deputy Cromwell observed two suspects make contact at the southwest corner of 8th and K. Cromwell also saw a Black female about 10 feet away, but she did not appear to be involved in the transaction. The man dressed in a gray sweatshirt, later identified as defendant, pulled something from his mouth and placed the objects in his left hand. He picked through the objects with his right hand and gave them to a second man, later identified as Douglas Hood, who was wearing a white tank top. After inspecting the objects, Hood handed what appeared to be cash to the defendant. At that point, the two men walked in opposite directions on 8th Street.

Deputy Cromwell testified he was approximately 120 feet away from the exchange he described. Nothing obstructed his view. He also indicated that the lighting was very good. On cross-examination, Cromwell testified that he was looking down at the people who were milling around on the mall. From his vantage point, and without the aid of binoculars, Cromwell was able to see defendant's face and Hood's hands and side.

Cromwell contacted Deputy Luke by cell phone and gave him a description of the two men he had observed. Luke followed Hood north on 8th Street, and Cromwell ran to catch up with him. Luke made contact with Hood and asked to see what he had in his clenched fist. Hood opened his hand and an off-white rock dropped to the ground. The two deputies found more off-white rocks that appeared to be narcotics in Hood's right pocket.

Cromwell and Luke handcuffed Hood as fast as they could, put him in the patrol car, and drove south on 8th Street. They found defendant standing by his bicycle at the corner of 7th and L. Deputy Cromwell immediately asked defendant to open his mouth. Instead, defendant clenched his teeth, pursed his lips "very tightly," and started swallowing. The deputies tried to apply pressure on defendant's mouth and took him to the ground. Defendant opened his mouth after about 20 seconds, but he had already swallowed. A search of defendant revealed \$192 in cash tucked inside one glove and two baggies of marijuana in the other. Defendant had a pager on his waistband.

Deputy Cromwell advised defendant of his *Miranda*<sup>2</sup> rights and took his statement. Defendant told Cromwell that the woman he was with set up the transaction. She gave him a \$50 bill, asked for change, and handed him the four rocks he gave to Hood. Defendant said he did not know whether the drugs were real.

Defendant testified on his own behalf at trial. He denied selling rock cocaine on the night of May 25, 2001. Defendant also denied telling Cromwell and Luke that a female friend had set up the transaction and handed him the four rocks of cocaine he gave to Hood. He did, however, acknowledge getting marijuana from his friend Nancy Simms that night. Defense counsel read

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<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

Simms's testimony from an earlier proceeding. She corroborated defendant's testimony regarding the marijuana purchase.

### **DISCUSSION**

Defendant argues the court's ruling in favor of Deputy Cromwell's invocation of the surveillance location privilege violated his constitutional right of cross-examination and denied him a fair trial. We conclude there is no merit in defendant's argument.

"The government has a privilege to refuse to disclose the exact location of a surveillance site if the public interest in preserving the confidentiality of that information outweighs the need for disclosure. [Citation.] Although the statutory basis for the privilege to maintain the confidentiality of the surveillance location is Evidence Code section 1040, that privilege has been analogized to the confidential informer identity privilege codified in Evidence Code section 1041.[3]

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<sup>3</sup> Evidence Code section 1041 states in part:

"(a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and: [¶] . . . [¶]

"(2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice . . . ."

[Citations.] If the court finds that a surveillance location is privileged, Evidence Code section 1042 provides the court must nonetheless make a finding adverse to the prosecution if the location is material to the defense.<sup>[4]</sup>” (*People v. Haider* (1995) 34 Cal.App.4th 661, 664-665 (*Haider*), original fns. omitted.) Whether the trial court properly exercised its discretion in deciding not to disclose the exact location of a surveillance site depends on the facts of the particular case. (*Id.* at p. 669.)

The standard for determining the materiality of the surveillance location is the same as that used in confidential informant cases. “[The] defendant ha[s] the burden of showing that in view of the evidence, there was a reasonable possibility that the location could constitute material evidence on the issue of guilt which would result in his exoneration.” (*People v. Walker* (1991) 230 Cal.App.3d 230, 238 (*Walker*).)

Defendant relies on *People v. Montgomery* (1988) 205 Cal.App.3d 1011 (*Montgomery*) and *Hines v. Superior Court* (1988) 203 Cal.App.3d 1231, which pre-date *Walker* and do not

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<sup>4</sup> Evidence Code section 1042, subdivision (a) provides:

“(a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material.”

apply this standard. As the Court of Appeal observed in *People v. Garza, supra*, 32 Cal.App.4th at page 156, "to the extent that *Montgomery* might be read to require only 'relevance on the issue of guilt or innocence,' without also requiring reasonable possibility of exoneration, we decline to follow it. Because location is always material in every evidence dispute involving police surveillance, were we to adopt such analysis we would be requiring trial courts to strike testimony in every case in which a confidential surveillance location is used. The Legislature could not have intended such an absurd result." (See also *Walker, supra*, 230 Cal.App.3d at p. 237.)

We conclude defendant waived the constitutional issue by not challenging exclusion of the privileged information or moving to strike Deputy Cromwell's testimony. (*Priestly v. Superior Court* (1958) 50 Cal.2d 812, 819 [defendant preserved the issue of the informant's identity for appeal by objecting to the officer's testimony on direct examination, demanding disclosure, and moving to strike the testimony]; see, e.g., *Walker, supra*, 230 Cal.App.3d at p. 233 [issue preserved for appeal by defendant's motion for new trial on grounds the court erred in allowing the police officer to invoke the surveillance location privilege] and *Montgomery, supra*, 205 Cal.App.3d at p. 1023 [issue preserved for appeal by defendant's motion to dismiss at the preliminary hearing and motion to strike the officer's testimony at trial].)

In any event, there was no abuse of discretion on the facts of this case. (*Haider, supra*, 34 Cal.App.4th at p. 669.) After



reviewing the transcript of the in camera proceedings, we conclude the record supports the trial court's implied finding that there was no reasonable possibility that disclosure of the surveillance location would provide material evidence resulting in defendant's exoneration. (*Walker, supra*, 230 Cal.App.3d at p. 238.)

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_, BUTZ, J.

We concur:

\_\_\_\_\_, SCOTLAND, P. J.

\_\_\_\_\_, SIMS, J.